

1 JANET M. HEROLD, Regional Solicitor  
2 SUSAN GILLETT KUMLI  
3 Deputy Regional Solicitor  
4 Kumli.Susan@dol.gov  
5 90 7th Street, Suite 3-700  
6 San Francisco, California  
7 Telephone: (415)625-7752  
8 Facsimile: (415) 625-7772

9  
10 ALICIA A.G. LIMTIACO  
11 United States Attorney  
12 MIKEL W. SCHWAB  
13 Chief, Civil Division  
14 JAMES J. BENEDETTO  
15 Assistant U.S. Attorney  
16 Sirena Plaza, Suite 500  
17 108 Hernan Cortez Avenue  
18 Hagåtña, Guam 96910  
19 Tel: (671) 472-7332  
20 Fax: (671) 472-7215

FILED  
Clerk  
District Court

DEC 15 2016

for the Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF:

Case No. MC 16-00041

ESTABLISHMENT INSPECTION OF:

**MEMORANDUM OF LAW IN SUPPORT  
OF EX PARTE APPLICATION FOR  
INSPECTION WARRANT**

MCC International Saipan Ltd. Co.

17 Thomas E. Perez, Secretary of Labor, U. S. Department of Labor, has brought this action  
18 under the Occupational Safety and Health Act of 1970 (“the Act”) to obtain a Warrant which  
19 authorizes the inspection by the Occupational Safety and Health Administration (“OSHA”) of the  
20 casino construction project of MCC International Saipan Ltd. Co. (“MCC”), located at Garapan,  
21 Saipan, MP 96950. MCC is a corporation which operates a construction contracting business and  
22 conducts business that affects interstate commerce by using United States based phone lines and  
23 internet services in order to order materials and supplies between China and the United States,  
24 specifically on the Island of Saipan in the Northern Mariana Islands. In addition, MCC

1 purchases fuel for their onsite vehicles such as cranes, trucks, loaders, and backhoes. MCC and  
2 its contractors employ approximately 1,800 employees.

3 On or about December 6, 2016, OSHA Compliance Safety and Health Officer (“CSHO”)  
4 Rick Foster arrived at the Imperial Pacific Resort Casino Construction project to conduct a safety  
5 and health inspection following a reported death at the work site and a complaint reported to  
6 OSHA. According to the Declaration of CSHO Foster, attached as Exhibit A, he spoke with  
7 Michael Fejeran, the Site Safety Officer, who told CSHO Foster to wait until their legal  
8 representative could be contacted in order to attend the opening conference. CSHO Foster stated  
9 that he would wait 45 minutes.

10 After an hour, CSHO Foster began his opening conference with Michael Fejeran (Site  
11 Safety Officer), Javier Dayat (Safety Consultant), David Rollera (Safety Consultant), Deb  
12 Camacho (Regulatory and Compliance Officer for Best Sunshine), Aldon Wong (Project  
13 Manager for Gold Mantis), Chan Sam Gazy, Ren Deping Jasen, Liu Yuan Xiong, and Alvin  
14 Zhem. Following the opening conference, Legal Counsel for Imperial Pacific Resort, Chuck  
15 McDonald, arrived and the CSHO held another brief opening conference with him. Mr.  
16 McDonald asked that the CSHO leave the room and after 30 minutes, he informed CSHO Foster  
17 that they would need more time to determine how to proceed and he asked CSHO Foster to  
18 leave. No inspection has been conducted.

19 MCC through Counsel for the Imperial Pacific Resort and MCC’s Site Safety Officer,  
20 Michael Fejeran, have refused to permit access by OSHA to its Imperial Pacific Resort Casino  
21 Construction Project for the purpose of a comprehensive safety and health inspection, although  
22 assured that such inspection would be conducted during regular working hours and at other  
23 reasonable times and within reasonable limits and in a reasonable manner as provided by the Act  
24 at 29 U.S.C. §657(a).

## ARGUMENT

Congress enacted the Occupational Safety and Health Act of 1970 (29 U.S.C. §§651 *et seq.*) “...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources...” (29 U.S.C. §651(b)). Under Section 5 of the Act, each employer (defined in Section 3(5) as including any “person engaged in a business affecting commerce who has employees”) is under the duty to provide safe and healthful employment free from recognized hazards and in compliance with the safety and health standards promulgated under the Act. The administration and enforcement of the Act is vested in the Secretary of Labor (“Secretary”). Section 8(a) of the Act authorizes the physical entry by representatives of the Secretary into worksites for the purpose of conducting safety and health inspections. Section 8(a) (29 U.S.C. §657(a)) reads as follows:

In order to carry out the purposes of the Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge is authorized-

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The Secretary has further promulgated regulations (found at 29 C.F.R. Part 1903) setting forth the manner in which inspections under the authority of Section 8(a) of the Act shall be conducted. Advance notice of inspections is prohibited under Section 17(f) of the Act except in the limited circumstances authorized by the Secretary at 29 C.F.R. §1903.6 (none of which are applicable in the instant case).

Typically, the Secretary attempts to conduct OSHA inspections without securing judicial

1 assistance in advance of the inspection. Should an employer object to an inspection, however,  
 2 resort to judicial process is sought through an *Ex Parte* Application for a Warrant for Inspection.  
 3 29 C.F.R. §1903.4. Stoddard Lumber Co., Inc. v. Marshall, 627 F. 2d 984 (9th Cir. 1980).  
 4 OSHA Regulations provide that *Ex Parte* Inspection Warrants shall be the preferred form of  
 5 compulsory process in all circumstances where compulsory process is relied upon to seek entry  
 6 to a workplace under this section. 29 C.F.R. §1903.4(d).

7 In Marshall v. Barlow's Inc., 436 U.S. 307 (1978), the Supreme Court held that the  
 8 warrant requirement of the Fourth Amendment is applicable to nonconsensual OSHA inspections  
 9 and that OSHA inspection warrants shall be issued only upon “administrative probable cause.”

10 Whether the Secretary proceeds to secure a warrant or other process, with or  
 11 without prior notice, his entitlement to inspect will not depend on his  
 12 demonstrating probable cause to believe that conditions in violation of  
 13 OSHA exist on the premises. Probable cause in the criminal law sense is not  
 14 required. For purposes of an administrative search such as this, probable cause  
 justifying the issuance of a warrant may be based not only on specific  
 evidence of an existing violation but also on a showing that “reasonable  
 legislative or administrative standards for conducting an...inspection are  
 satisfied with respect to a particular (establishment) *citing Camara v. Municipal  
 Court*, 387 U.S. 523, 538 (1967).

15 Barlow's Inc., 436 U.S. at 320.

16 Barlow's and Camara remain controlling law today. The Ninth Circuit, in Stoddard  
 17 Lumber Company, Inc., v. Marshall, 627 F.2d 984 (1980) addressed the issue of the probable  
 18 cause which must be demonstrated by the Secretary in her application for an OSHA Inspection  
 19 warrant. Citing Barlow's and Camara, the Court reiterated the Supreme Court's holding that,  
 20 for purposes of an administrative search, probable cause justifying the issuance of a warrant may  
 21 be based not only on specific evidence of an existing violation, but also on a showing that  
 22 “reasonable legislative or administrative standards for conducting an inspection are satisfied with  
 23 respect to a particular establishment.”

24 In Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir. 1982), the employer  
 appealed from a contempt order entered against it by the U.S. District Court for the District of

1 Idaho for refusing to honor an OSHA warrant. One of the company's contentions was that  
 2 OSHA lacked probable cause for issuance of a warrant. The Court, citing Barlow's, reiterated  
 3 that warrants for OSHA inspections need not be based on probable cause in the criminal law  
 4 sense. Further, the Court said, "Subsequent [to Barlow's], 'virtually every federal court has  
 5 concluded that criminal probable cause is not required for issuance of a warrant for an OSHA  
 6 inspection'."

7       Hern and some of its progeny, including Montana Sulphur & Chemical Company, 32  
 8 F.3d 440 (9th Cir. 1994), which arose from OSHA inspection warrants issued based upon  
 9 employee complaints, revisited not only the issues of the degree of probable cause in regard to  
 10 OSHA inspections, but the breadth of inspections which can be conducted based upon such  
 11 complaints. In each case, the employer had attempted to limit the scope of the OSHA inspection  
 12 to the allegations of the specific employee complaint. Montana Sulphur considered the  
 13 employer's contention that OSHA inspections arising from employee complaints should be  
 14 restricted to investigation of the precise problems complained of and nothing more. The Court  
 15 opined:

16       In our view, aside from being contradicted by the governing Statute and  
 17 regulations, that construction makes no sense. At bottom, OSHA's mission  
 18 is the assurance of safety. If an employee points out a risk of catastrophic  
 19 explosion, OSHA must be allowed the opportunity to ensure that such an  
 20 event does not occur... OSHA should be allowed to examine a problem  
 21 area until it can be given a clean bill of health. Montana Sulphur, *supra*, at  
 22 446... OSHA is authorized by Congress to investigate any dangers alleged  
 23 by employee complaints if it determines that cause exists. 29 U.S.C.  
 24 §657(f)(1). This power is not limited to complaints alleging violations of  
 specific regulations, nor must OSHA cite specific regulations before it  
 investigates. *Id.* See also Reich v. Kelly Springfield Tire Company, 13 F.3d  
 1160 (7th Cir. 1994).

25       The investigation in the instant case did arise due to an online complaint by a doctor  
 26 working in the Emergency Room of the Saipan Hospital reporting serious injuries at the said  
 27 construction project on a daily basis. The doctor reported that employees arrived from the  
 28 worksite with two instances of amputation and two instances of falls that resulted in serious  
 29 fractures. In addition, MCC International Saipan Ltd. Co. reported to OSHA that an onsite  
 30 worker had a heart attack and died on December 4, 2016. The "probable cause" supporting the

1 Warrant for Inspection sought in this proceeding is found in the complaint filed, the reported  
2 fatality at the jobsite, and in the initial information obtained by the investigator, CSHO Foster,  
3 and set forth in his Declaration. OSHA attempted entry to conduct an inspection, and was denied  
4 entry.

5 OSHA regulations found at 29 C.F.R. §1904.2 require employers covered by the Act to  
6 maintain in each establishment a log and summary of all recordable occupational injuries and  
7 illnesses for that establishment and to enter each recordable injury and illness on the log and to  
8 complete the OSHA 300 logs and summaries in the detail provided in the OSHA 300 form and  
9 instructions thereon. It is not known whether MCC International Saipan Ltd. Co. has maintained  
10 these required records because OSHA has not been permitted entry to inspect such records.  
11 Failure to conduct such an investigation impedes OSHA's ability to ascertain that the employer is  
12 fulfilling his responsibility under the general duty clause of the Act to "furnish to each of his  
13 employees' employment and a place of employment which are free from recognized hazards that  
14 are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C.  
§654. The contemporaneous records are critical to OSHA's ability to enforce the Act.

15 OSHA has satisfied its burden to show probable cause because MCC International Saipan  
16 Ltd. Co. is a covered employer, subject to OSHA's jurisdiction. OSHA's mandate, to ensure  
17 safe and healthful working conditions, depends on its ability to conduct unscheduled inspections.  
18 Matthews has denied OSHA the opportunity to conduct such an inspection.

19 The Secretary of Labor in this action is specifically requesting an ***Ex Parte Inspection***  
20 ***Warrant.*** The Secretary is entitled, under 29 C.F.R. §1903.4, to seek and obtain an *Ex Parte*  
21 Warrant for inspection purposes where right of entry has been refused. The regulation further  
22 states, "Ex parte inspection warrants shall be the preferred form of compulsory process in all  
23 circumstances where compulsory process is relied upon to seek entry to a workplace under this  
24 section." 29 C.F.R. §1903.4(d). That right has been upheld by the Ninth Circuit in Stoddard  
Lumber Company, Inc., v. Marshall, *supra*. Citing Barlow's, the Stoddard court, in discussing  
the Ex Parte warrant procedure employed by the Secretary, concluded that even the Barlow's

Court recognized that “surprise searches” were authorized by the act and “contemplated” by the regulations. As stated earlier herein, OSHA regulations at 29 C.F.R. §1903.6 prohibit advance notice of inspections, with very few narrow exceptions. The Secretary contends that the right to an *Ex Parte* Warrant for Inspection is necessary to the fulfillment of the Secretary’s enforcement duties under the Act.

In this case, an *Ex Parte* Warrant for Inspection of the Imperial Pacific Resort Casino Construction Project location serves the purposes of the Act and would not be unduly intrusive to MCC. The Warrant Application procedure is not an appropriate venue to review any potential violations on the merits.

**CONCLUSION**

For the foregoing reasons, the Secretary of Labor respectfully requests that this Honorable Court issue an *Ex Parte* Warrant for Inspection of the Imperial Pacific Resort Casino Construction Project, Garapan, Saipan, MP.

DATED this 15<sup>th</sup> day of December 2016.

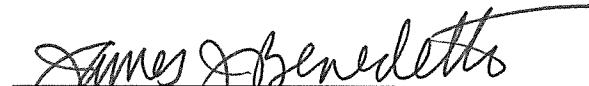
M. PATRICIA SMITH  
Solicitor of Labor

JANET HEROLD  
Regional Solicitor

SUSAN GILLETT KUMLI  
Deputy Regional Solicitor

ALICIA A.G. LIMTIACO  
United States Attorney  
Districts of Guam and the NMI

By:

  
JAMES J. BENEDETTO  
Assistant U.S. Attorney